Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

DREW CASS,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GARY W. GRAMER
Counsel of Record
GARY W. GRAMER & ASSOCIATES
2780 Middle Country Road
Lake Grove, New York 11755
(516) 471-0000

Attorneys for Petitioner Drew Cass

44 pp

QUESTION PRESENTED

1. May the Court enter into a plea agreement with limitations upon sentencing and change that agreement without the consent of the defendant in violation of defendant's 5th and 14th Amendment Rights?

LIST OF PARTIES

The parties to the proceeding below were the People of the State of New York , with offices in Suffolk County, New York (Respondent), and Drew Cass, residing in South Setauket, Suffolk County, New York.

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PETITION FOR WRIT OF CERTIORARI

Drew Cass, the Petitioner herein, prays that a writ of certiorari issue a review the judgment of the New York State Court of Appeals dated August 29, 1997 and entered on September 3, 1997.

OPINIONS BELOW

The original unpublished opinion of the New York State Court of Appeals dated August 29, 1997, is reprinted as Appendix A to this Petition.

The Order of the Appellate Term of the Supreme Court of the State of New York for the Ninth and Tenth Judicial

Districts held in Nassau County on May 2, 1997 is reprinted as Appendix B to this Petition.

The transcript and testimony from October 23, 1995 wherein before the Honorable Ira P. Block, a plea agreement was entered into with an agreement that defendant would be sentenced to 30 days community service, is reprinted as Appendix C to this Petition.

The transcript of February 15, 1996 wherein unilaterally, Judge Ira Block breached his agreement with defendant and sentenced him to 30 days in Suffolk County Jail, is reprinted as Appendix D to this Petition.

The Certificate of Eligibility for Community Service dated February 14, 1996, is reprinted as Appendix E to this Petition.

The transcript of February 20, 1996 wherein the Court recanted its promise, is reprinted as Appendix F to this Petition.

The transcript of January 4, 1996 wherein the Court stated on line 18, page 3 "They've brought everything in here, so it can be handled with one person, so its a matter of judicial economy. Let's put it that way."; and on line 9, page 4, "While I understand while there is some consternation on your part, we're dealing with a situation where there was a commitment made and a plea bargain that was taken at that point..." is reprinted as Appendix G to this Petition.

JURISDICTION

This petitioner seeks to review the final judgment from the New York State Court of Appeals. The New York State Court of Appeals judgment was dated August 29, 1997 and entered on September 3, 1997.

STATEMENT OF THE CASE

Defendant was charged in the District Court of Suffolk County with two Violations of Probation, one count of Offering a False Instrument for Filing in the Second Degree in violation of *Penal Law*, Section 175.30 and four violations of the *Brookhaven Town Code*.

On October 23, 1995, defendant appeared with his attorney before the Honorable Ira P. Block and, after a conference with the District Attorney, was permitted to plead guilty to one of the Violation of Probation counts (Docket #3295432) and to the charge of Offering a False Instrument for Filing in the Second Degree (7-8). It was understood and agreed that the remaining charges against defendant, including the second Violation of Probation charge and all the *Brookhaven Town Code* violations, would be dismissed in satisfaction; that defendant would be sentenced to 30 days community service if found to be eligible and that a fine would be imposed.

A probation report was ordered which indicated that an individual from both the Town Attorney's Office and the Suffolk County Citizen's Affairs Bureau (equivalent to a consumer protection department) were displeased with the agreed upon plea disposition. On February 15, 1996, the Court continued to stand by the bargained for sentence commitment. The Court thereafter, due to pressure from an Assistant Town Attorney, agreed to modify all of its prior decisions and suddenly insisted upon a change of plea, including a plea to an additional violation of the Town of Brookhaven Code.

REASONS FOR GRANTING WRIT

The People cited the case of *People of the State of New York vs. Selikoff*, 35 NY 2nd 227 as leading and controlling authority on the issue of modification of promises made by the Court. A review of the case reflects that it is well settled law within the State of New York that adherence of the sentencing promise at the time of plea is a strong public policy in New York conditional upon it being lawful and appropriate in the light of the pre-sentencing report as it was in the case at bar. The intervention in this case by a non involved prosecutor from another jurisdiction clearly violates the spirit of the *Silikoff* case and violates the defendants 5th and 14th due process Amendments in that where all of the requirements of a plea bargain have been met including in this case a determination that he was eligible for community service having been

issued, see Appendix "C", at that point, any modification by a sentencing Judge would have violated defendant's due process.

CONCLUSION

WHEREFORE, Petitioner, Drew Cass, due process rights were violated and prays that a writ of certiorari issue from this Honorable Court to review the judgment of the New York State of Appeals in re The People of the State of New York v. Drew Cass, and that the matter be reversed and remanded with direction that the matter be dismissed.

Respectfully submitted,

GARY W. GRAMER, ESQ.
GARY W. GRAMER & ASSOCIATES
Attorneys for Petitioner
2780 Middle Country Road
Lake Grove, New York 11755
(516) 471-0000

APPENDIX

Appendix A

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. JUDITH S. KAYE, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

DREW CASS

Appellant.

CERTIFICATE DENYING LEAVE

I, JUDITH S. KAYE, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
August 29, 1997

/s/ Judith Kaye
Chief Judge

* Order of the Appellate Term, 9th and 10th Judicial Districts, entered May 2, 1997, dismissing an appeal of a judgment of District Court, Suffolk County, rendered February 20, 1996.

*Description of Order:

Appendix B

CASE NO 96-636 S CR
MAR. 25, 1997 TERM

At a term of the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts held in NASSAU County, on

MAY 2 - 1997

Present-Hon. ANDREW J. DI PAOLA PRESIDING JUSTICE
" " THOMAS M. STARK ASSOCIATE JUSTICE
" " PATRICIA D. COLLINS ASSOCIATE JUSTICE

----------x

The People of the State of New York,

Respondent,

–against–

DREW CASS

Appellant

----------x

The above named appellant having appealed to this court from JUDGMENTS OF CONVICTION of the DISTRICT COURT, SUFFOLK COUNTY rendered on 2/20/96 and the said appeal having been submitted by TRACY J.HARKINS,ESQ., counsel for the appellant, and submitted by RONALD E. LIPETZ,ESQ., counsel for the respondent and due deliberation having been had thereon;

It is hereby ordered and adjudged that the appeal is unanimously dismissed.

TRACY J. HARKINS,ESQ.
625 MIDDLE COUNTRY ROAD
CORAM,N.Y.11727

2780 M.C Rd
Lake Grove

DISTRICT ATTORNEY
APPEALS BUREAU
200 CENTER DRIVE
RIVERHEAD,N.Y.11901

/s/ John A. Cahill

JOHN A. CAHILL
CHIEF CLERK
APPELLATE TERM

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM : 9th and 10th JUDICIAL DISTRICTS

PRESENT: DiPAOLA, P.J., STARK and COLLINS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

–against–

DREW CASS,

Appellant.

NOS. 96-636 S CR
and 96--1136 S CR

DECIDED

MAY 2 1997

Appeal by defendant from judgments of the District Court, Suffolk County (I. Block, J., at plea and sentence) rendered February 20, 1996 convicting him of offering a false instrument for filing in the second degree (Penal Law § 75.30) and outdoor storage of appliances in violation of section 51-1 (C) of the Brookhaven Town Code and adjudicating him in violation of probation, and imposing sentences of 30 days, 15 days and 30 days respectively, said sentences to be served concurrently.

Appeal unanimously dismissed.

Defendant, on this appeal, in essence contends that the judgments of conviction should be reversed and the informations dismissed as he received harsher sentences than initially promised. Since the sentences have been served, any question as to their propriety is moot (*see*, *People v Bierweiller*, 40 AD2d 833; *People v Nogan*, 25 AD2d 528).

Appendix C

TO: GRAMER & MELBARDIS
625 Middle Country Road
Coram, NY 11727

FROM: DIANE WAGNER
Court Reporter
First District Court of Suffolk Cty.
400 Carleton Avenue
Central Islip, NY 11722

DATE: March 26, 1996

CASS,

Re: PEOPLE v. DREW October 23, 1995
Docket Nos. 5405-95, 3295432
Courtroom D34 Hon. Ira Block

Enclosed please find the transcript you requested in the matter of Drew Cass. I have received your check of $45.00 (#40587) for full payment of same. Thank you.

Sincerely,

/s/ Diane Wagner
Diane Wagner,
Court Reporter

Enc.

Nos 10/20/95

[Illegible]

THE COURT: I understand the People have a proposed disposition.

MR. DUNN: That's correct, your Honor. Pending before you, your Honor, I believe there's two violations of Probation, offering a false instrument, and an outdoor storage case. So totally you have five cases. I believe the defendant's going to be entering a plea of guilty to Docket number 9679 of 91. One of the VOPs --

MR. KOSACK: 9679 of 91. If you want the DWI, it's the other one.

THE COURT: It's the other one.

MR. KOSACK: 3295432. Also will be entering a plea of guilty to Docket 5405 of 95. That's offering a false instrument.

That is correct, your Honor. We join in the application in all respects.

THE COURT: And with regard to the other three matters?

MR. DUNN: We will move to dismiss them in satisfaction.

THE CLERK: Excuse me. Second docket he's pleading to [Illegible]

MR. DUNN: 405.

MR. KOSACK: Of '95.

THE CLERK: Is that a BRT matter?

THE COURT: No, that's filing a false instrument second degree violation of Section 175.30 and have you two worked out a proposed disposition?

MR. DUNN: That's correct, your Honor. We would recommend a sentence of thirty days incarceration and in lieu of

that, Community Service. Furthermore, that the defendant be restored to Probation.

THE COURT: And there will be fines on that too?

MR. KOSACK: That's correct. Fines will be in the discretion of the Court. We didn't bargain for a fine.

THE COURT: May I inquire of your client?

MR. KOSACK: You certainly may.

THE COURT: Raise your right hand.

DREW DOUGLAS CASS, having been duly sworn, testified as follows:

THE COURT: May we have your name, address, and date of birth?

THE DEFENDANT: My name is Drew Douglas Cass. July 31, 1959. 2585 Middle Country Road, Centereach, New York 11720.

THE COURT: And your date of birth?

THE DEFENDANT: July 31, 1959.

BY THE COURT:

Q Mr. Cass, you are the defendant in this matter Have you discussed the case completely with your attorney?

A Yes, I have, your Honor.

Q How old are you?

A Thirty six.

Q Do you read and write English?

A Yes, I can.

Q What's the highes grade you completed in sch

A One year of college.

Q Any promises been made to you with respect to punishment or sentence in order to induce your plea other than what's been stated here on the record?

A Just what's been stated.

Q Anything else been promised to you?

A No.

Q Any one force or threaten you into pleading guilty?

A No.

Q Do you understand by pleading guilty, you are waiving your right toa trial by the Court or by jury?

A Yes, I do, your Honor.

Q Waiving your right to testify or not to testify as you see fit?

A Yes, I do, your Honor.

Q Waiving your right to confront the People's witnesses against you?

A Yes.

Q Waiving your right to have the People prove your guilt beyond a reasonable doubt?

A Yes, I do, your Honor.

Q And waiving your privilege against self-incrimination?

A Yes, I do, your Honor.

Q Are you currently on Probation or Parole other than those probations that are before me?

A That's it.

Q Have you read the charges? Do you understand them?

A Yes, I did.

Q Any question in your mind as to pleading guilt

A No.

Q Do you understand that this is a crime, a misdemeanor which you can go to jail for up to one year, three years probation, a fine or a combination thereof?

A Yes, I do, your Honor.

Q You understand a violation of Probation, that that means that you are admitting that on March 31, 1994 you entered a plea of guilty to driving while intoxicated and it's further alleged and that you are admitting that you committed acts which resulted in your arrest for filing a false instrument?

A Yes.

Q And that by pleading guilty to the other charge, you are also admitting the violation of Probation?

A Yes.

Q Do you understand, as I said, these are crimes. Do you understand that?

A Yes.

Q March 10, 1994 at Suffolk County Citizens Affairs Office in Hauppauge in the Town of Smithtown, County of Suffolk, State of New York. did you in support of a licensing application submit false invoices which evidenced experience in the home electronics field knowing that the licensing authority would rely on the information in considering granting a license and the documentation was false?

A Yes.

Q And you further --okay. Court will accept the pleas. How do you plead to violating your probationary status?

A I guess guilty. Yes.

Q Court will accept those pleas. I'm going to order another pre-sentence investigation on the Class A misdemeanor. I don't know if I really need one. Yeah, I will because I'm also going to ask that he be screened for Community Service.

MR. KOSACK: I had filled out a form. I don't know if this is the right form.

THE COURT: I believe it may be but you will have to ask the Clerk about that. What I'm doing is I am going to enter thirty days or Community Service if eligible. Continued Probation. I'm dismissing the other ones which is Brookhaven Town Ordinance, 595 of 95, Brookhaven Town Ordinance, 596 of 95 and Brookhaven Town Ordinance, 597 of 95 and 598 of 95. There are four Town Ordinance files being dismissed that are before me and the other two cases which is filing a false

THE COURT: December 26. That's two and a half months. I got a feeling we are probably going to be closed that week.

MR. KOSACK: Sounds like it.

THE COURT: January 4 for sentencing, which is a Thursday.

MR. KOSACK: Thank you very much.

THE DEFENDANT: Have a nice day, your Honor. Thank you.

** ** **

CERTIFICATION

I, Diane Wagner, an Official Court Reporter, hereby certify that the foregoing is a true and correct transcript of the stenographic notes.

/s/ Diane Wagner

Appendix D

DISTRICT COURT OF THE COUNTY OF SUFFOLK

FIRST DISTRICT: CENTRAL ISLIP, NEW YORK

PEOPLE OF THE STATE OF NEW YORK,	X	DOCKET NOS.
		20607-95
		20606-95
-against-		20605-95
		20604-95
DREW CASS,		09679-91
		05405-95
DEFENDANT.		3295432
	X	

February 15, 1996

BEFORE:

HON. IRA P. BLOCK
District Court Judge

APPEARANCES:

FOR THE TOWN:
Town of Brookhaven
3233 Route 112
Medford, NY 11763

BY: HAROLD A. STEUERWALD
Assistant Town Attorney

FOR THE PEOPLE:
JAMES M. CATTERSON, JR.
Suffolk County District Attorney

BY: DOUG WIGDOR
Assistant District Attorney

FOR THE DEFENDANT:
MARK S. KOSAK, ESQ.
168 Laurel Avenue
Northport, New York

MARIA CAMPO
OFFICIAL COURT REPORTER

COURT CLERK: Drew Cass.

MR. KOSAK: Mark S. Kosak, 168 Laurel Avenue, Northport, New York.

THE DEFENDANT: Good morning, Your Honor.

MR. KOSAK: We had conferenced this the last time. Probation officer asked for thirty days to do further investigation. No further report issued. Based upon the offer of the Court last time, it was going to be thirty days jail to be converted into --

THE COURT: I don't know that was a possibility. Right now I think Mr. Cass has been very busy. Still working.

MR. STEUERWALD: Your Honor, I am not aware there was any plea. I'm from the Town of Brookhaven on this Matter. My understanding the file has been lost.

THE COURT: They have been resurrected apparently.

MR. STEUERWALD: My understanding there was no plea taken on any of the files.

THE COURT: I think there were.

MR. STEUERWALD: Last time the Matter was on, the files were lost. When the Town appeared, we were trying to locate the files since then. The Town did not authorize any pleas.

THE COURT: Let me say this to you. In reviewing the Probation Report, I can't go along with community service.

MR. KOSAK: Is that a supplemental report?

THE COURT: Report for today.

MR. KOSAK: I didn't see a copy of that.

THE COURT: You would not get a copy of it. The Court gets these. That's number one.

MR. KOSAK: I'm sorry.

THE COURT: Mr. Cass is a wonderful person. He has done things to prove the adage that the pen is mightier than the sword. He has to go to jail. That's what it boils down to. Thirty days in the Suffolk County Jail. No community service. I want you to understand that. He will understand because I said it now for purposes of the record. He has lived his life. For the next three years he will be mine. If he continues along his merry way, that's what it boils down to. This is an updated report. Sentence date was February 15, 1996, which is today. Would you like to see this Counselor, you are welcomed to review it. That's what I see so far. I'm not interested in community service.

MR. KOSAK: Okay. Would it be possible to address start of the jail term?

THE COURT: No. Today is the day he goes in.

THE DEFENDANT: Your Honor --

THE COURT: Don't talk to me, sir. I suggest you speak to your attorney. Everything you say will be taken down. Can be taken down. Is taken down. You have many things in your life that you control. The things you have to control now is your time. Your attorney will speak on your behalf or at least to prove the things you need to tell the Court. Is that fair?

MR. KOSAK: Yes, it is.

THE COURT: Here is the report. If you would like to review it in the meantime. Now, getting back to the Town's position.

MR. STEUERWALD: Your Honor, the Town's position, we would oppose any dismissal of the Town charges. Mr. Cass has been repeated violator of the Town ordinances repeatedly. We were not made any part of any disposition. We were not aware of this. Our records show Mr. Gramer. We have made contact with Mr. Gramer about the fact the files were lost by the clerk. We wrote to him about the finding of the files by the Chief Clerk, and that they were on today. We would oppose an outright dismissal of our cases.

THE COURT: Even if they were dismissed in satisfaction of pleas taken to the other criminal matters, filing a false statement and violation of probation --

MR. STEUERWALD: We would want a plea to some of the charges. At least one of the charges.

THE COURT: Despite any penalty that the Court might impose, in other words, if he pled to something and I gave him U.D., your position you would then have a plea to something?

MR. STEUERWALD: We want a plea.

THE COURT: I'm sure we will be able to work that out. That's not a major problem. I apologize to you on behalf of the Court system just so you understand. I say this in all sincerity. The ultimate responsibility here is mine. Files are lost or misplaced. These things happen. That responsibility is mine. I do apologize to the Town of Brookhaven, to you personally. It's just that under the system that we have now, and you worked here. You know what I am talking about. Files are here and transmitted someplace. Transported. Taken and it's unfortunate because sometimes a file will be put down with another group of files, and they pick up the other groups of files and leave this one. These are some of the problems that happen. The ultimate responsibility is mine. If there is an apology here, it is mine. I know you are going to say it's --

MR. STEUERWALD: It is not necessary.

THE COURT: The ultimate responsibility is mine. And I do apologize to the Town. If the Town from your position if you want me to write a letter to the Town, I would be happy to do so. Not happy about it, but I would do it because I think the ultimate responsibility is mine. I do apologize to the Town.

MR. STEUERWALD: I don't think it's anyone's fault. The confusion being transferring from Sixth District to here sometimes things happen.

THE COURT: It is my responsibility, so I do apologize to the Town.

MR. STEUERWALD: I appreciate it.

THE COURT: I will give you a chance to review the report for a few minutes.

MR. KOSAK: Thank you.

(Case laid aside; later recalled.)

COURT CLERK: Drew Cass.

THE COURT: My understanding the defendant is making application to withdraw his plea of not guilty heretofore entered into. Substitute instead a plea of guilty to violation of Section 51-1C, Code of Town of Brookhaven. That as the owner of premises 2585 Route 25, Centereach, New York, appliances consisting of washers, dryers and refrigerators to be stored outside on the northern portion of such property within B residential zoning district of the Town of Brookhaven; is that correct?

MR. KOSAK: That is correct.

MR. STEUERWALD: Yes.

THE COURT: That's your understanding, Counsel?

MR. STEUERWALD: Yes, Your Honor. Thank you.

THE COURT: May I inquire of your client?

MR. KOSAK: Yes, you may, Your Honor.

D R E W C A S S,

the defendant in this Matter, having first been duly sworn by the Court, testified as follows:

THE COURT: May we have your name, address, and date of birth.

THE DEFENDANT: Drew Douglas Cass. July 31, 1959.

THE COURT: Your address? Home address.

THE DEFENDANT: 12 Lily Drive, South Setauket, New York.

THE COURT: Mr. Cass, you are the defendant in this Matter. Have you had an opportunity to speak with your attorney?

THE DEFENDANT: Yes, I did.

THE COURT: How old are you, sir?

THE DEFENDANT: 36 years old.

THE COURT: You read and write English?

THE DEFENDANT: Yes, I can.

THE COURT: What's the highest grade you completed in school?

THE DEFENDANT: One year of college.

THE COURT: Any promise been made to you with respect to punishment or sentence in order to induce you to plea guilty other than a conference with your attorney and Town Attorney, indicating I would be sentencing you to 15 days in the Suffolk County Jail concurrent with the sentence to be imposed in another matter?

THE DEFENDANT: Yes, that means same time, Your Honor?

THE COURT: Same time. Anything else been promised to you?

THE DEFENDANT: No.

THE COURT: Anyone force you or threaten you into pleading guilty?

THE DEFENDANT: No.

THE COURT: You understand by pleading guilty you are waiving your right to trial by this Court or by jury?

THE DEFENDANT: Yes, I do.

THE COURT: You are waiving your right to testify or not testify as you see fit?

THE DEFENDANT: Yes.

THE COURT: You are waiving your right to confront the People's witnesses against you?

THE DEFENDANT: Yes.

THE COURT: You are waiving your right to have the People prove your guilt beyond a resonable doubt?

THE DEFENDANT: Yes.

THE COURT: You are waiving your privilege against self-incrimination?

THE DEFENDANT: Yes.

THE COURT: Are you currently on probation or parole?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You are on probation?

THE DEFENDANT: Yes, Your Honor.

THE COURT: That was just the one before me. Anyone else you are on probation anywhere else?

THE DEFENDANT: No.

MR. KOSAK: All files are before this Court.

THE COURT: Good. Did you read the charges? Do you understand them?

THE DEFENDANT: Yes, I did, Your Honor.

THE COURT: Any question in your mind as to pleading guilty?

THE DEFENDANT: No.

THE COURT: You understand that this is a crime, misdemeanor for which you could have gone to jail for a longer period of time, probation, fine or combination thereof?

THE DEFENDANT: Yes.

THE COURT: On March 24, 1995, at approximately 10:35 a.m., 2585 Route 25, in Centereach in the Town of Brookhaven, County of Suffolk, State of New York, did you knowingly commit a violation of Section 51-1C of the Code of Town of Brookhaven, by causing appliances consisting of washes, dryers and refrigerators to be stored outdoors on the northern portion of the property located within B residential district of the Town of Brookhaven?

THE DEFENDANT: Yes.

THE COURT: Satisfactory to the People?

MR. STEUERWALD: Yes, Your Honor. Thank you.

THE COURT: The Court will accept the plea. It is my understanding the defendant is engaged in a business?

MR. KOSAK: That is correct, Your Honor.

THE COURT: What kind of business is he engaged in, and the name of it?

MR. KOSAK: Active Appliance.

THE COUPT: Is it a corporation or company?

MR. KOSAK: This is?

THE DEFENDANT: it's self-proprietorship.

THE COURT: It is not a corporation?

THE DEFENDANT: No. It's not organized as a corporation.

THE COURT: Are you the sole owner of that business?

THE DEFENDANT: Myself and my wife.

THE COURT: Fifty, fifty?

THE DEFENDANT: I believe so. Yes. Of course.

THE COURT: You are a partner in that business?

THE DEFENDANT: Well, Your Honor, it's filed as me being the owner. Anything that is mine is really my wife's.

THE COURT: So, you are the registered owner of the business?

THE DEFENDANT: Yes.

THE COURT: Where is that business located?

THE DEFENDANT: It has two locations. One being located at 2585 Middle Country Road, Centereach, New York. The second location is 83 Fifth Avenue, Bay Shore, New York.

THE COURT: Are you licensed to do business by Consumers Affairs?

THE DEFENDANT: Yes, I am, Your Honor.

THE COURT: In what capacity?

THE DEFENDANT: I have appliance repair license that I held since 1980 continuously in effect for Suffolk County.

THE COURT: It is in effect now?

THE DEFENDANT: Yes, it is, Your Honor. It has been and never had a lapse.

THE COURT: Any other licenses that are held with the County?

THE DEFENDANT: No. I just have an application pending for home improvement, contractor license.

THE COURT: There is a sentence we are going to impose this morning. Speaking with Counsel, you asked it be imposed Tuesday.

MR. KOSAK: That's correct, Your Honor.

THE COURT: That will be February 20th. Any objection by the People?

MR. WIGDOR: No, Your Honor.

MR. STEUERWALD: No objection.

THE COURT: These Matters will be adjourned to February 20th for purposes of sentencing. With the caveat if you fail to appear on that date, if you are arrested for another incident, then all promises heretofore made to your attorney on the record would be void. You understand that?

THE DEFENDANT: Yes, I do.

THE COURT: February 20th. See you back here.

MR. KOSAK: Thank you very much, Your Honor.

THE DEFENDANT: Thank you, Your Honor.

* * * * * * * * * *

CERTIFICATION

I, MARIA CAMPO, an Official Court Reporter, do hereby certify that the above is a true and accurate record of my stenographic notes taken on the above date.

/s/ Maria Campo

MARIA CAMPO
OFFICIAL COURT REPORTER

Appendix E

COMMUNITY SERVICE PROGRAM OF SUFFOLK COUNTY
Bldg. 16, County Center North
Veterans Memorial Highway
Hauppauge, NY 11788
Tel: 853-5182 fax: 853-6111

INITIAL REFERRAL TO ALTERNATIVE ASSIGNMENT

From: Judge Block DC Room D54 CC Room____ SC Room____

Ind./Docket No: 5405??5/3245432 Date of Birth 7/?/59

Mr.
MS: Cass, Drew
please print last, first and middle names

Defendant's address 2585 Route ??

City/State/Zip CENTERREACH, NY 11720

Phone (516) 588-0193

is being referred by me to the **Community Service Program** today to be considered for community service as

☑ Adult **pre-sentence** alternative to incarceration, _____ hours in lieu of _____ jail days.

☐ **Post plea** (hours to be completed before sentencing), ____ hours. CPL 400.10 & CPL 170.55(6)

☐ **Post sentence** as an alternative to incarceration, ____ hours in lieu of ___ jail days.

The sentencing disposition is scheduled for 2/15/96
(Date)

The court directs that any P.S.I. report or any information obtained by the Probation Department in accordance with Article 390 CPL, be made available for inspection and review by CSP Investigator to determine eligibility to the Community Service Program.

_____ _____

(Judge) (Date)

THIS SECTION TO BE COMPLETED BY COMMUNITY SERVICE AND RETURNED TO COURT

☑ **ELIGIBLE,** meets criteria & will be acceptable to COMMUNITY SERVICE PROGRAM

RECOMMENDATIONS Alcohol Conditions

☐ **NOT ELIGIBLE** - see attached memo

DATE 2/14/96 /s/ Illegible
Director

CSP# 5105946

CSP-SC2-83(CC,DC,SC)-94; Court (Original), CSP (Green); Defendant (Canary), Probation (Pink)

Appendix F

DISTRICT COURT OF THE COUNTY OF SUFFOLK

FIRST DISTRICT: CENTRAL ISLIP

PEOPLE OF THE STATE OF NEW YORK,	X	DOCKET NOS.
	:	20607-95
	:	20606-95
-against-	:	20605-95
	:	20604-95
DREW CASS,	:	09679-91
	:	05405-95
DEFENDANT.	:	3295432
	X	

February 20, 1996

BEFORE:

HON. IRA P. BLOCK
District Court Judge

APPEARANCES:

FOR THE TOWN:
Town of Brookhaven
3233 Route 112
Medford, NY 11763

BY: CAREN L. LOGUERCIO
Assistant Town Attorney

FOR THE PEOPLE:
JAMES M. CATTERSON, JR.
Suffolk County District Attorney

BY: DOUGLAS WIGDOR
Assistant District Attorney

FOR THE DEFENDANT:
NAIBURG and ROSENBLUM
222 Veterans Memorial Highway
Hauppauge, New York

BY: MATTHEW J. ROSENBLUM, ESQ.

MARIA CAMPO
OFFICIAL COURT REPORTER

COURT CLERK: Drew Cass.

MR. ROSENBLUM: I was retained over the weekend on Drew Cass. I represent to the Court I have been retained. I believe it would be his application to be relieved.

MR. KOSAK: Based upon his representation, yes.

THE COURT: Is your client here?

MR. ROSENBLUM: I would assume he's on line getting into the building. I met with him yesterday.

THE COURT: His he ready for sentencing this morning?

MR. ROSENBLUM: I would like a conference.

THE COURT: You can have a conference, but he is going to be sentenced or he will be remanded. One of the two. You can take as long as you would like, Mr. Rosenblum. These dilatory tactics will not be dealt with by this Court. Just so you understand, and that's how we are going to start the conference.

MR. ROSENBLUM: I'm a little remissive not taking place in any discussions beforehand. I only know what I have been told by my client who I have represented, I am sure as you are aware, many, many times in the past not on these charges. I believe I represented him on the original charges which led to him being placed on probation by both this Court and Judge Bennett. It would be hard for me to say I'm fully aware of the facts of the case just having been supplied with the paperwork.

THE COURT: You will be given all the time to be able to see him as long as he is in custody. You are relieved, Counsel.

MR. KOSAK: I wanted to make sure you didn't need me any further.

THE COURT: No. Thank you. If he does not show up today, we will order immediate arrest.

MR. ROSENBLUM: I can appreciate that. If we could have a conference?

THE COURT: Sure.

MR. ROSENBLUM: Maybe we can confernence this. I need to become familiar -- can we go off the record?

THE COURT: No. Continue.

MR. ROSENBLUM: I don't know if he is permitted at this point and time to withdraw his plea or not.

THE COURT: No. No, he is not.

MR. ROSENBLUM: Was there a promise of no jail made at the time of the taking of the plea?

THE COURT: Way back when, and I told him if I could, he didn't take anymore time, therefore I told him he was going for thirty days. We discussed that. We bargained for that.

MR. ROSENBLUM: If we could conference this.

THE COURT: Sure.

(Case laid aside; later recalled.)

COURT CLERK: Drew Cass.

MR. ROSENBLUM: Naiburg and Rosenblum, 222 Veterans Memorial Highway, Hauppauge. Mathew Rosenblum.

THE COURT: May I have your name and relationship.

MRS. CASS: Laura Cass. Wife.

THE COURT: People represented by?

MR. WIGDOR: Douglas Wigdor.

MRS. LOGUERCIO: Caren Loguercio for the Town of Brookhaven.

THE COURT: Defendant ready for sentence?

MR. ROSENBLUM: Yes, Your Honor.

THE COURT: Any just cause or reason why sentence should not now be imposed?

MR. ROSENBLUM: No. I would just state we had a rather lengthy conference in Chambers with both the Assistant District Attorneys present.

THE COURT: And the Town.

MR. ROSENBLUM: Miss Loguercio. I spent the last couple of hours talking to either or all three of you. To the Court with one of the others present. Based on our lengthy discussions with my client, his wife and other members of his family and friends, he is now ready for sentence.

THE COURT: Anything you would like to say on behalf of the defendant?

MR. ROSENBLUM: Your Honor, I would rely on our conference. I think that I made it clear that I think he's going to be and the family is going to face severe economic disadvantage as a result of acts which were nobody's fault but his own but led him to where he is today. I'll state for the record, I tried my best to adjourn this sentence in that after discussing with the Court whether or not the Court would permit such adjournment, I relayed the details of our conversation with the District Attorney and the Town Attorney present to my client. He stands ready to be sentenced.

THE COURT: Anything you would like to say on your own behalf, sir?

THE DEFENDANT: Yes, Your Honor. I just want you to know I did read the probation report. I am remorseful for the charges. After being released my outlook will be a lot different. I'm sorry for any inconvenience I caused the Court or the adversaries.

THE COURT: People?

MR. WIGDOR: Nothing, Judge.

THE COURT: Town?

MS. LOGUERCIO: Nothing further, Your Honor.

THE COURT: Mr. Cass, I have never known anyone ready to be sentenced who didn't have a certain amount of remorse. Your history goes back to 1976. During that time, violations, there was a fine imposed. Second fine. A third fine. A fourth fine and then probation in '88. Probation in '90. Probation in '93. Conditional discharge. Then we came to this series of events. Sentence which I am about to impose upon you is something that does not come easy. I believe you earned a certain period of incarceration. At this point, it's time for you to understand that a constant movement by you to flaunt the Law cannot be permitted. Whether the Law involves Citizen Affairs or involves the Town of Brookhaven or County of Suffolk of the State of New York. Each of these entities are entitled to have their rules, regulations and Laws obeyed. Perhaps we have gone through twenty years of your life without imposing a restriction in your liberties, and that has allowed you to feel that you could flaunt the Law. There is a time this comes to an end. Therefore, under Brookhaven Town 596-96, docket 20605 of '95, judgment of the Court, you entered a plea of guilty to violation of Section 51-1C, Brookhaven Town ordinance, you be sentenced to a period of incarceration of fifteen days in the Suffolk County Jail. As to the violation of probation, judgment of the Court you be sentenced to a period of incarceration thirty days Suffolk County Jail. As to violation of Section 175.30 of the Penal Law, offering a false instrument for filing, judgment of the Court you be sentenced to a period of incarceration thirty days Suffolk County Jail.

Each of them to be concurrent with each other and concurrent to themselves.

MR. ROSENBLUM: There was another violation of probation which I believe it was Judge Bennett's violation.

THE COURT: I think it will be dismissed in sat of this.

COURT CLERK: In reference to surcharges?

THE COURT: I don't know if there are any surcharges. Penal Law surcharge, total of $90 in surcharges. That's $85 and $5, total of $90. When will that be paid?

MR. ROSENBLUM: That can be paid today. If I could just make a record. It's my understanding based upon my conversations with the Assistant District Attorney, that this sentence and this plea involves all known charges that exists.

THE COURT: The ones that are on the calendar today, 20605 of '95, 20604 of '95, 20606 of '95, 20607 of '95, 5405 of '95, and docket 234068.

MR. ROSENBLUM: I think the representation made to me the District Attorney is unaware of any other charges that are pending.

THE COURT: I have no idea.

MR. WIGDOR: To my knowledge, I only know what's in this Courtroom.

MR. ROSENBLUM: Also, I believe, Town of Brookhaven similarly has no other outstanding charges?

MS. LOGUERCIO: That's my understanding.

THE COURT: Good. Thank you.

THE DEFENDANT: Thank you, Your Honor. Have a nice day.

THE COURT: You too, good luck.

* * * * * * * * * * *

CERTIFICATION

I, MARIA CAMPO, an Official Court Reporter, do hereby certify that the above is a true and accurate record of my stenographic notes taken on the above date.

/s/ Maria Campo
MARIA CAMPO
OFFICIAL COURT REPORTER

Appendix G

DISTRICT COURT OF THE COUNTY OF SUFFOLK

FIRST DISTRICT: CENTRAL ISLIP, NEW YORK

PEOPLE OF THE STATE OF NEW YORK,	
- against -	Dkt:
DREW CASS,	
Defendant	

Central Islip, New York
January 4, 1996

BEFORE: HON. IRA BLOCK
District Court Judge

APPEARANCES: HON. JAMES M. CATTERSON,
Suffolk County District Attorney
Cohalan Court Complex
Central Islip, New York

BY: JOSEPH LOMBARDO, Esq.

NAIBURG & ROSENBLOOM
For Defendant

BY: MATTHEW ROSENBLOOM, Esq.

Reported by:
Edmund C. Reiss
O. C. R.

COURT CLERK: Drew Cass.

ASS'T D.A.: Your Honor, if I may, I haven't had a chance to discuss this with defense counsel. I know the probation

officer for this case just came in. I haven't had a chance to speak to him yet.

I was also hoping to speak to the A.D.A that handled this last time.

THE COURT: There is a request for an adjournment? Peggy Sabat Morrow was taken ill shortly before Christmas, and they're asking for a six week adjournment. Are you on this case also?

DEFENSE COUNSEL: Yes, I am.

THE COURT: They're asking for an adjournment on the new matter. What about the V.O.P.?

PROBATION OFFICER: The V.O.P. is based on the new arrest.

DEFENSE COUNSEL: There are two of them.

THE COURT: We just got that this morning. I'm sorry about that, but they're asking for a six week adjournment for -- is there a plea on this?

DEFENSE COUNSEL: It was all packaged up last time.

ASS'T D.A.: If I can ask what the court files reflect s far as the disposition that was worked out.

DEFENSE COUNSEL: Thirty day jail commitment which was going to be converted to community service, and the judge was going to impose a fine for the other outstanding matter.

PROBATION OFFICER: Are there two?

DEFENSE COUNSEL: One involved Brookhaven Town Attorney's Office. My understanding is that that was going to be in the Sixth District Court.

DEFENSE COUNSEL: That was brought in here.

PROBATION OFFICER: So in other words, both issues -- the one with the Citizen's Affairs and the issue with Brookhaven Town are being both packaged together?

DEFENSE COUNSEL: Yes.

THE COURT: They've brought everything in here, so it can be handled with one person, so its a matter of judicial economy. Let's put it that way.

PROBATION OFFICER: I understand that. I have spoken to people in Brookhaven Town and the People in the Citizen's Affairs, and both agencies have put in an incredible amount of time into pursuing the matters. I was hoping something more than one thirty-day shot could be done. If it could be sixty days and then community service. I'm trying to increase the time of community service that the defendant will have to work.

THE COURT: In the meantime, we'll order a report from Probation -- presentence investigation.

While I understand while there is some consternation on your part, we're dealing with a situation where there was a commitment made, and a plea bargain that was taken at that point, so right now, we have a situation but they're asking for six weeks, so I'm going to be adjourning this until February 15th.

ASS'T D.A.: People ready on all matters.

* * * * * * * * * *

CERTIFICATION

CERTIFIED to be a true and accurate transcript of the proceedings of the above captioned matter.

/s/ Edmund C. Reiss
Court Reporter

Supreme Court, U.S.
F I L E D
JAN 26 1998
CLERK

No. 97-1153

In The

Supreme Court of the United States

October Term, 1997

DREW CASS,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of New York

RESPONDENT'S BRIEF IN OPPOSITION

RONALD E. LIPETZ
Assistant District Attorney
Counsel of Record

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QUESTION PRESENTED

DID THE SENTENCING COURT VIOLATE DEFENDANT'S RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WHEN IT SENTENCED HIM TO A TERM OF INCARCERATION RATHER THAN A BARGAINED-FOR PERIOD OF COMMUNITY SERVICE?

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari, seeking review of the New York State Court of Appeals' Certificate denying Petitioner's application for leave to appeal to that Court.

OPINONS BELOW

The opinions rendered by the State Courts have not been reported. However, the Certificate of Chief Judge Judith S. Kay of the Court of Appeals of the State of New York, dated August 29, 1997, denying Petitioner leave to appeal to that Court is reproduced in Petitioner's Appendix as Exhibit A (A.1). Similarly, the Order and Memorandum Decision of the Appellate Term of the Supreme Court of the State of New York, dated May 2, 1997, dismissing Petitioner's appeal to that Court is reproduced in Petitioner's Appendix as Exhibit B (A.2-A.4).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. section 1257(a) and claims he has been denied his right to due process of law under the Fifth and Fourteenth Amendments to the Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States
Amendment V

"No person shall be – deprived of life, liberty or property, without due process of law."

Constitution of the United States
Amendment XIV

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York *Criminal Procedure Law*, section 220.60, subd. 3 provides as follows:

"At any time before the imposition of sentence, the court in its discretion may permit a defendant who has entered a plea of guilty to the entire indictment or to part of the indictment, or a plea of not responsible by reason of mental disease or defect, to withdraw such plea, and in such event the entire indictment, as it existed at the time of such plea, is restored."

New York *Criminal Procedure Law*, section 440.10, subd. 1(h) provides as follows:

"At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

(h) The judgment was obtained in violation of a right of the defendant under

> the constitution of this state or of the United States."

New York *Criminal Procedure Law*, section 380.50, subd. 1, provides, in pertinent part, as follows:

> "At the time of pronouncing sentence, the Court must accord the prosecutor an opportunity to make a statement with respect to any matter relevant to the question of sentence. . . . "

STATEMENT OF THE CASE

Petitioner was charged in the District Court of Suffolk County with two Violations of Probation (New York *Criminal Procedure Law*, section 410.30); one count of Offering a False Instrument for Filing in the Second Degree (New York *Penal Law*, section 175.30); and four violations of the *Brookhaven Town Code*.

On October 23, 1995, Petitioner appeared with his attorney before the Honorable Ira P. Block and, after a conference with the District Attorney, was permitted to plead guilty to one of the Violation of Probation counts [Docket #3295432] and to the charge of Offering a False Instrument for Filing in the Second Degree (A.6-A.10).[1] It was understood and agreed tl.at the remaining charges against Petitioner, including the second Violation of Probation charge and all the *Brookhaven Town Code* violations, would be dismissed in satisfaction; that Petitioner would be sentenced to 30 days of community service *if found to be eligible*, and that probation would be restored (A.6-A.10).

---

[1] Refers to the page numbers of Petitioner's Appendix.

A probation report was ordered and sentencing was adjourned to January 4, 1996 (A.10).

On January 4, 1996, the matter was adjourned by Judge Block to February 15, 1996 because of the illness of Petitioner's Probation Officer (A.32-A.33). However, according to a Probation Department representative who was present, both the Suffolk County Citizen's Affairs Bureau and the Town of Brookhaven had put a considerable amount of time and effort into this matter and the authorities were hoping for a more substantial sentence to be imposed than that which had been promised (A.33). The Court recognized the representative's consternation, but stated that a plea had been taken and a sentencing commitment made (A.33).

On February 15, 1996, Harold A. Steuerwald, Esq., Assistant Town Attorney of the Town of Brookhaven, appeared before the Court and advised Judge Block that Petitioner was a persistent violator of the *Town Code*; that the Town of Brookhaven was not a party to any plea-bargaining agreement in this case; that the Town had not authorized the taking of a disposition; that the Town was not even present on October 23, 1995 when Petitioner agreed to take a plea; that the Town was unalterably opposed to the dismissal of all the Town charges; and that at the very least, the Town would insist on a guilty plea to at least one of the Town charges (A.12-A.15).[2]

---

[2] A Court is without jurisdiction to take a plea to a reduced charge in the absence of the appropriate prosecutor's consent. *Matter of Blumberg v. Lennon*, 44 A.D.2d 769 (Fourth Department, 1974); *Matter of Cosegrove v. Kubiniec*, 56 A.D.2d 709, 710 (Fourth Department, 1977); *Matter of Hinrelein v. Nenno*, 168 A.D.2d 957, 958 (Fourth Department, 1990).

Following a conference with Mr. Steuerwald, Petitioner was permitted to plead guilty to violating section 51-1C of the *Brookhaven Town Code* (one count) in that as an owner of premises at 2585 Route 25, Centereach, New York, Petitioner allowed various appliances consisting of washers, dryers and refrigerators to be stored outside on the northern portion of his property (A.15-A.18).

Thereupon, Judge Block reviewed an updated probation report; observed that he could not go along with community service in any of these cases; and stated the following on the record:

> "Mr. Cass (Petitioner) is a wonderful person. He has done things to prove that the pen is mightier than the sword. He has to go to jail. That's what it boils down to. Thirty days in the Suffolk County Jail. No community service. I want you to understand that. He will understand because I said it now for purposes of the record. He has lived his life. For the next three years he will be mine. If he continues along his merry way, that's what it boils down to. This is an updated report. Sentence date was February 15, 1996, which is today. Would you like to see this Counselor, you are welcomed to review it. That's what I see so far. I'm not interested in community service.
>
> MR. KOSAK (Petitioner's counsel): Okay. Would it be possible to address start of the jail term?
>
> THE COURT: No. Today is the day he goes in." (A.13)

At defense counsel's request, the matter was adjourned to February 20, 1996 (A.20).

On February 20, 1996, new counsel appeared for the Petitioner and requested a conference with Judge Block (A.25). The Court advised counsel he could have a conference, but that the Court was cognizant of the dilatory tactic and that one way or the other Petitioner was going to be remanded (A.25).

After the conference, when Petitioner was asked if there was any just cause or reason why sentence could not be imposed, counsel indicated his client was ready to be sentenced and that he would rely upon the just concluded conference with the Court (A.27).

When asked if he'd like to address the Court prior to the imposition of sentence, defendant indicated he had read the probation report and was remorseful (A.28). The Court noted, however, that it had never known anyone about to be sentenced who did not feel a certain amount of remorse (A.28).

It further appears that Petitioner has a legal history dating back to 1976; that he has been subject to various fines over the years; that he has been subject to a conditional discharge; and that he has been placed on probation in 1988, 1990 and 1993 (A.28). Judge Block then commented as follows:

> "I believe you earned a certain period of incarceration. At this point, it's time for you to understand that a constant movement by you to flaunt the Law cannot be permitted. Whether the Law involves Citizens Affairs or involves the Town of Brookhaven or County of Suffolk or the State of New York. Each of these entities is entitled to have their rules, regulations and Laws obeyed. Perhaps we have gone through

> twenty years of your life without imposing a restriction in your liberties, and that has allowed you to feel that you could flaunt the Law. There is a time this comes to an end." (A.28)

Thereupon, the Court proceeded to sentence Petitioner as follows: Leaving Various Appliances Outside – 15 days in the Suffolk County Jail; Violation of Probation – 30 days in the Suffolk County Jail; Offering a False Instrument for Filing – 30 days in the Suffolk County Jail. The sentences were directed to be served concurrently (A.28-A.29).

At no time prior to the imposition of sentence on February 20, 1996 did Petitioner ever move to withdraw his guilty pleas, pursuant to New York *Criminal Procedure Law*, section 220.60, subd. 3, on the ground that the Court was about to break its "plea-bargaining agreement"; nor did Petitioner ever object to the sentences that were actually imposed by Judge Block; nor did Petitioner ever move to set the judgments of conviction aside, pursuant to *Criminal Procedure Law*, section 440.10, subd. 1(h), on the ground that his constitutional rights had been violated.

On May 2, 1997, the Appellate Term of the Supreme Court of the State of New York dismissed Petitioner's appeal to that Court on the ground that since Petitioner was, in essence, questioning the harshness of the sentences that had been imposed and since the sentences had actually been served by Petitioner, any question as to their propriety was moot (A.2-A.4).

And, on August 29, 1997, Chief Judge Judith S. Kaye denied Petitioner's application for leave to appeal to the

New York Court of Appeals certifying that no question of law had been presented by Petitioner requiring review by the Court of Appeals (A.1).

REASONS FOR DENYING THE PETITION

A. PETITIONER'S CLAIM THAT THE SENTENCING COURT VIOLATED HIS RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WHEN IT SENTENCED HIM TO A TERM OF INCARCERATION RATHER THAN A BARGAINED-FOR PERIOD OF COMMUNITY SERVICE HAS NOT BEEN PRESERVED FOR REVIEW BY THIS COURT.

It is settled law that any sentencing promise at the time of plea is, as a matter of law and strong public policy, conditioned upon its being lawful and appropriate in the light of the subsequent presentence report or information obtained from other reliable sources. [*People v. Selikoff*, 35 N.Y.2d 227, 238 (1974), *cert. den.*, 419 U.S. 1122 (1974); *People v. Ifill*, 108 A.D.2d 202, 204 (Second Department, 1985); *People v. Grant*, 99 A.D.2d 536 (Second Department, 1984)] and the fact that Judge Block in the instant case did not explicitly condition his promise upon his later evaluation of the presentencing report is of no consequence [*People v. Selikoff, supra* at p. 238]. Indeed, the implication is apparent from the record that 30 days of community service would be imposed *only* if Petitioner was found to qualify for it in the first instance (A.10). *People v. Selikoff, supra* at p. 238.

Here, Judge Block's examination of Petitioner's presentence report reveals that Petitioner did not qualify for

community service; that he had a legal history dating back to 1976; that he had been subjected to various fines over the years; that he had once before been subjected to a conditional discharge; and that he had been placed on probation in 1988, 1990 and 1993 (A.28). The opportunity which allowed Petitioner to flaunt the law with impunity in the past had obviously come to an end (A.28).

Thus, Petitioner's presentence report provided a sufficient basis for Judge Block to refuse to abide by his original promise of community service and, instead, to impose a term of incarceration in its place. *People v. Ifill, supra* at p. 204; *People v. Grant, supra* at p. 536 [citing with approval *People v. Selikoff*, 35 N.Y.2d 227, 338]. Petitioner, of course, has no constitutional right to a plea-bargain. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977); *People v. Peterson*, 91 Misc.2d 407, 410 (Supreme Court, Bronx County, 1977).

The fact that the Community Service Program of Suffolk County found Petitioner to be "eligible" for Community Service is also of no consequence. Sentencing is primarily a judicial responsibility [*People v. Selikoff, supra* at pp. 240-241; *People v. Farrar*, 52 N.Y.2d 302, 305-308 (1981)] and, while entitled to consideration, the recommendation of the Community Service Program was not binding upon Judge Block who properly rejected it as being inadequate (A.13, A.28). *People v. Arogundy*, 112 A.D.2d 1003, 1004 (Second Department, 1985); *People v. Semkus*, 122 A.D.2d 287, 288 (Second Department, 1988).

Pursuant to New York *Criminal Procedure Law*, section 220.60, subd. 3, a motion to withdraw a guilty plea is

addressed to the sound exercise of the trial court's discretion [*People v. Stubbs*, 110 A.D.2d 725, 727 (Second Department, 1985); *People v. Kelsch*, 96 A.D.2d 677, 678 (Third Department, 1983)] and must be supported by a showing that defendant has been deprived of some basic right. In short, withdrawal is not to be had merely for the asking [Preiser, Practice Commentary, McKinney's Cons. Laws of New York, Book 11A, CPL 220.60, subd. 3, p. 110].

Here, no timely or appropriate motion to withdraw defendant's pleas was made either on February 15, 1996 [when it became apparent that Judge Block was not going to sentence defendant to community service] or on February 20, 1996 [the date of actual sentence]. And, of course, no showing was ever made that defendant had been deprived of some basic right.

Indeed, at sentencing on February 20, 1996, when asked if there was any just cause or reason why sentencing could not then be imposed, defense counsel replied: "No" (A.27). And, when asked if he had anything to say prior to the imposition of sentence, Petitioner merely stated he was remorseful (A.27-A.28).

Thus, Petitioner's failure at the time his sentence was imposed to either object to the sentence or to move to have his pleas withdrawn precluded the New York Appellate Courts from reviewing Petitioner's claim that Judge Block failed to abide by his sentencing promise, especially where, as here, the sentences actually imposed were neither illegal or excessive and intervention in the interest of justice was unwarranted. *People v. Lanterman*, 194 A.D.2d 630 (Second Department, 1993); *People v. Delrosa*, 188 A.D.2d 486 (Second Department, 1992); *People*

v. Warren, 187 A.D.2d 475 (Second Department, 1992) and *People v. Burton*, 133 A.D.2d 276, 277 (Second Department, 1987).

Moreover, by failing to object to his plea and sentence in the trial court by motion to vacate [New York *Criminal Procedure Law*, section 440.10, subd. 1(h)] or otherwise, Petitioner has failed to preserve the claim that the sentences imposed violated his rights under the Fifth and Fourteenth Amendments. *Parker v. North Carolina*, 397 U.S. 790, 798 (1970); *Edelman v. California*, 344 U.S. 357, 358 (1952).

Thus, in *Parker v. North Carolina, supra*, the question arose as to whether the Indictment to which Parker pleaded guilty was invalid because members of his race were allegedly systematically excluded from the Grand Jury which returned the Indictment. The North Carolina Court of Appeals refused to consider the claim since under North Carolina law an objection to the composition of the Grand Jury must be made by a motion to quash in the trial court prior to the entry of the guilty plea. Because Parker had failed to raise his objection in timely fashion, relief was unavailable. In affirming Parker's conviction for first degree burglary, this Court, per Justice White, declined to consider the issue regarding the selection of the Grand Jury since the state rule of practice relied on by the North Carolina Court of Appeals constituted an adequate state ground precluding review by the Supreme Court..

Similarly, in *Edelman v. California, supra*, Edelman was tried and convicted in a state court on a charge of vagrancy. He appealed and contended for the first time in

the California appellate court that the vagrancy statute was unconstitutionally vague. However, the Appellate Court affirmed the conviction. Thereafter, Edelman petitioned this Court for certiorari contending again that the vagrancy statute was invalid for vagueness. In an opinion by Justice Clark, the Court determined that the validity of the California statute was not properly before the Court because the issue had not been timely raised in the trial court.

To the same force and effect as the cases discussed above are: *Herndon v. Georgia*, 295 U.S. 441, 442 (1934) [Constitutional question not considered since the issue was not timely presented in the state courts]; *Hulbert v. Chicago*, 202 U.S. 275, 279-280 (1906) [Constitutional claims were never presented to state trial court thereby precluding review by the U.S. Supreme Court]; *Mutual Life Insurance Co. v. McGrew*, 188 U.S. 291, 308-309 (1903) [Where constitutional claims were not raised in state trial court, Supreme Court declined to review].

Similarly, Petitioner's claim that Mr. Steuerwald's "intervention" in this matter violated his Fifth and Fourteenth Amendment rights to due process was never presented to the state courts – either at the trial level or the appellate level. Hence, under the authorities cited above, the Court should decline to review the issue. In any event, the record reveals that Petitioner pleaded guilty to violating section 51-1C of the *Brookhaven Town Code* (one count) (A.18); that Mr. Steuerwald was an Assistant Town Attorney (A.11); and, that he (Steuerwald) had every right and duty to make his position known to the Court (A.14). See also, New York *Criminal Procedure Law*, section 380.50, subd. 1.

B. PETITIONER ALLEGES NO COMPELLING REASON FOR GRANTING CERTIORARI.

Neither the Appellate Term of the State of New York nor the New York Court of Appeals has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals.

Nor has the Appellate Term of the State of New York nor the New York Court of Appeals decided an important question of federal law that should be settled by this Court.

Moreover, neither the Appellate Term nor the New York Court of Appeals has decided an important question of federal law that conflicts with relevant decisions of this Court.

Finally, the determination of the New York Courts in this case turns upon its own particular facts and will affect few others than the actual litigants themselves. Furthermore, the law favors the finality of criminal convictions, particularly those based upon pleas of guilty. *McMann v. Richardson*, 397 U.S. 759, 773-774 (1970); *People v. LaRuffa*, 34 N.Y.2d 242, 245 (1974). In view of the fact that Petitioner has failed under 28 U.S.C. section 1257(a) to properly raise a substantial federal question warranting review by this Court, his pleas and convictions in New York should become final.

CONCLUSION

BASED UPON THE FOREGOING, THE PETITION FOR CERTIORARI SHOULD BE DENIED.

DATED: Riverhead, N.Y.
January 26, 1998

Respectfully submitted,

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(3)

97-1153

No.

Supreme Court, U.S.
FILED
FEB 25 1998
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

DREW CASS,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY

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3 PP.

STATEMENT

We wish to call to the Court's attention that it is the position of the County that there was no attempt to withdraw the guilty pleas on the ground that the Court was about to break its plea bargain agreement pursuant to Criminal Procedure Law, Section 220.60, Subd. 3.

The Court may clearly note that based on the annexed copy of the transcript dated February 20, 1996, the Court refused to permit Mr. Cass to withdraw his plea and breached its promise to him even though Mr. Cass had complied with all of the provisions of that promise. In part, as noted on Page 4, the parties stated the following on the record:

> "MR. ROSENBLUM: I can appreciate that. If we could have a conference?
>
> THE COURT: Sure.
>
> MR. ROSENBLUM: Maybe we can conference this. I need to become familiar — can we go off the record?
>
> THE COURT: No. Continue.
>
> MR. ROSENBLUM: I don't know if he is permitted at this point and time to withdraw his plea or not.
>
> THE COURT: No. No, he is not.
>
> MR. ROSENBLUM: Was there a promise of no jail made at the time of the taking of the plea?
>
> THE COURT: Way back when, and I told him if I could, he didn't take anymore time, therefore I told him he was going for thirty days. We discussed that. We bargained for that.
>
> MR. ROSENBLUM: If we could conference this.
>
> THE COURT: Sure."

Based upon the foregoing Appellant's Brief and Reply, the Petition for Certiorari should be granted in all respects.

Dated: Lake Grove, New York
February 24, 1998

Respectfully submitted

GARY W. GRAMER, ESQ.
GARY W. GRAMER & ASSOCIATES
Attorney for Appellant